Supreme Court, U.S.
FILED

No. 091480 JUN 2 - 2010

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In The

Supreme Court of the United States

PETER F. SUTTON,

Petitioner,

vs.

COUNTRYWIDE HOME LOANS, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does evidence of fraud by a mortgage broker in misrepresenting the terms of a loan to the borrower, and misrepresenting the borrower's income to the lender, create a triable issue as to whether fees paid by the lender to the broker violate the prohibition in 12 U.S.C. § 2607 against unearned fees?

PARTIES

The parties to the proceedings for which review is sought are those appearing in the caption of this case. In addition, Apex Mortgage Services, LLC was a named party defendant in the district court. There is some uncertainty regarding who may be the current actual holder of the note and mortgage at issue; we understand that Bank of New York may be the holder, and that Bank of America may be servicing the note and mortgage.

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OPINIONS BELOW

The opinion of the Court of Appeals (App. 1-8), and the order denying rehearing (App. 15), are both unpublished. The district court's order granting summary judgment (App. 9-14) is also unpublished.

STATEMENT OF JURISDICTION

The decision of the Court of Appeals was entered on December 4, 2009. App. 1. Mr. Sutton's petition for rehearing and for rehearing en banc, was denied on March 5, 2010. App. 15. This Court has jurisdiction to review the decision of the Court of Appeals pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION

The question presented involves the Real Estate Settlement Procedures Act, 12 U.S.C. § 2607, which is reproduced in the Appendix. App. 17-22.

STATEMENT OF THE CASE

In May of 2006, Peter Sutton had mortgage payments of $1,420 per month. His only income was $1,078 per month in Social Security. Mr. Sutton received a call from Christopher Medley, of Apex Mortgage Services, Inc. ("Apex"), who told Mr. Sutton he

could lower his mortgage payments to $428 per month.

Mr. Medley mailed a blank loan application, instructing Mr. Sutton to sign the last page and return the otherwise blank form. Mr. Medley explained that he would complete the form with information obtained over the phone. Mr. Medley also mailed Mr. Sutton a disclosure statement showing an interest rate of 2.25% with monthly payments of $428 per month. Mr. Medley did not request documentation of income from Mr. Sutton because, by lender design, this loan did not call for such documentation. Mr. Sutton's offer to provide documentation was declined.

Mr. Medley obtained the terms of the proposed loan from the website-based automated underwriting system of Countrywide Home Loans, Inc. ("Countrywide"). This system allows a broker to log in, enter variables, and then the system determines what the rate would be and whether the applicant qualifies. Under this system, Countrywide originally offered a mortgage which would have reduced payments on Mr. Sutton's first mortgage to $426.20, but this did not cover a second mortgage owed by Mr. Sutton.

Mr. Sutton ultimately received a loan requiring monthly payments of $1,018.74, and subject to further increase. Mr. Sutton cannot make such payments, as his total income is only $1,078 per month. Mr. Medley knew Mr. Sutton's income was $1,078 per month.

Mr. Medley explained how the terms changed from $426.20 per month. After learning of Mr. Sutton's second mortgage, an application was filled out by Apex for a $157,000 loan. In this new application, Mr. Medley testified that he increased Mr. Sutton's asserted income level to $4,500 per month "based on what the program guidelines were." That resulted in a new application form for a loan with a proposed monthly payment in the amount of $889.29, consolidating both Mr. Sutton's first and second mortgages. This second loan was approved via Countrywide's automated underwriting system. Despite approval of a loan for payments of $889.25, Mr. Sutton was then sold a loan with minimum payments beginning at $1,018.74, subject to upward adjustment. By procuring a loan with higher monthly payments, Mr. Medley was able to receive a higher payment from Countrywide.[1]

To qualify Mr. Sutton for the loan, Apex misrepresented that he was earning $4,500 per month as an electrician for a drive in movie theater. Mr. Sutton

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[1] This is not unusual:

> Consumers who rely on brokers often are unaware . . . that a broker's interests may diverge from, and conflict with, their own interests. In particular, consumers are often unaware that a creditor pays a broker more to originate a loan with a rate higher than the rate the consumer qualifies for based on the creditor's underwriting criteria.

Proposed Amendment to Regulation Z, 73 Fed. Reg. 493, 500 (2008).

had done some part-time work for the Lake Drive-In in Belle Glade, but this was years prior to the loan at issue. Mr. Medley relied on his own knowledge of what an electrician might earn, and referred to the website, salary.com.

Furman Birchfield, who owned the drive-in, was never contacted by Apex, Mr. Medley, or Countrywide about Mr. Sutton's supposed employment. Countrywide's underwriting manager, David Hand, testified, however, that Countrywide called the drive-in to verify that Mr. Sutton was employed there. Mr. Hand also reviewed a credit report showing Mr. Sutton was retired, and he knew that Mr. Sutton was 79 years of age.

The record does indicate how occasional part-time work performed years earlier came into the loan application papers:

> Mr. Medley PRESSED me on the telephone about whether I had ever done odd jobs around town to pick up extra money. I wondered why he cared, but I said I had done some odd jobs for the Lake drive-in in Belle Glade, Florida ten years ago.

(D 58 at 4). This apparently was the kernel around which Apex fabricated the claim that Mr. Sutton was drawing a salary of $4,500 per month to do electrical work for a drive-in movie theater.

On June 6, 2006, a notary arrived at Mr. Sutton's home with an armful of papers for him to sign. The

notary said she was in a big hurry and needed Mr. Sutton to sign everything as quickly as possible:

> Trusting that any mistake would be corrected later, I signed and Ms. Bennet left with the papers.
>
> About a week later, Countrywide mailed me a large packet of papers from the closing and I finally had a chance to read them all.
>
> Looking at the TILA disclosure statement signed at the closing, I quickly realized that it said the interest rate was over 9% and that I did not have the ability to pay over 9% on a $157,000 loan, nor to make monthly payments that would go as high as $1,400 monthly; which is what these subsequent loan applications and TILA disclosures revealed.

(D 58 at 6-7). Mr. Sutton called Mr. Medley to complain about the discrepancy, and Mr. Medley told him "if I didn't like it, I should refinance with someone else." (D 58 at 7).

Countrywide paid Apex fees totaling $7,270. Half of these amounts were in turn paid by Apex to Mr. Medley.

Mr. Sutton filed suit alleging that Apex misrepresented payments he would owe under a refinance agreement, misrepresented his income to Countrywide, and as a result procured a loan requiring payments beyond Mr. Sutton's capacity to pay. Mr. Sutton alleges the payment from Countrywide to Apex for

procuring this loan violates the Real Estate Settlement Procedures Act, 12 U.S.C. § 2601-2617 ("RESPA").

The District Court granted Countrywide's motion for summary judgment, concluding that evidence of broker fraud does not present a triable issue as to the legality of the fees. A panel of the United States Court of Appeals for the Eleventh Circuit affirmed, relying on the two-step test developed to consider whether brokerage fees violate RESPA. This test examines whether actual services were provided, and whether the compensation paid is reasonably related to the value of those services:

> Sutton argues that Apex's acts should not count as "actual services" . . . because they were undertaken as part of a scheme to defraud Sutton by misrepresenting his financial capacity to Countrywide and arranging for him an "unsuitable loan." . . . Because Apex provided no "actual services," Sutton argues, any yield spread premium payment to Apex violates the Real Estate Act under step one of the test. Sutton also contends that even if Apex is found to have offered "actual services," the compensation was unreasonable under step two of the test because the "total array of services" that Apex performed was of no value in that he was left with a loan he could not afford. We reject these arguments.
>
> The Real Estate Act's anti-kickback provisions forbid lenders from compensating brokers for referrals. These provisions are

> not the appropriate vehicle for considering globally – as Sutton would have us do – whether a broker provided fair, honest, and adequate service to a borrower.

App. 5-6.

REASONS FOR GRANTING CERTIORARI

Whether payments rewarding broker fraud violate RESPA is an issue of sufficient importance to justify certiorari review. The Courts of Appeals are in conflict.

I. Issue Is One of Exceptional Importance

Predatory lending practices have been sufficiently common to prompt enforcement proceedings against Countrywide and other lenders by Attorney Generals in Florida and several other States. See Frank Hirsch, Jr., *Credit Crisis Drives Coordinated State Enforcement Activities*, Consumer Fin. Servs. L. Rprt. 3-04 (Aug. 20, 2008). While any borrower is a potential victim of such practices, the elderly, recent immigrants, and those who reside in disadvantaged communities are particularly vulnerable.[2]

[2] See Nicole Lutes Fuentes, *Defrauding the American Dream: Predatory Lending in Latino Communities and Reform of California's Lending Law*, 97 Cal.L.Rev. 1279 (2009); Ellen E. Schultz, *Older Borrowers, Out in the Cold*, Wall St. J., April 14,

(Continued on following page)

A central feature enabling such loans has been an application process, designed by lenders, which discourages documentation of income. In testimony to the Federal Reserve, the President of the Mortgage Brokers Association for Responsible Lending explained that a lender's normal concerns about performance are mooted where such loans are sold to others.[3] At the middle of many of these transactions, involved in both advising borrowers and providing information to lenders, are mortgage brokers.[4]

Our economy is slowly emerging from a financial crisis in large part arising from inappropriate lending practices. These include an epidemic of loans tainted by fraud, with the acquiescence and enablement of lenders, such as Countrywide, who discouraged documentation and rewarded mortgage brokers with high fees. The fallout continues, as our courts are clogged with foreclosures, and our financial institutions remain weak.[5] Such lending practices have resulted in the failure of large financial institutions (including

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2009 at D1, available at http://online.wsj.com/article/SB123967085817315655.html (viewed on Dec. 22, 2009).

[3] Available at http://www.federalreserve.gov/secrs/2006/august/20060801/op-1253/op-1253_3_1.pdf (viewed Dec. 22, 2009).

[4] For a brief description of the role of mortgage brokers, see Gary M. Case and Michelle Himes-Wiederschall, *Mortgage Broker Claims*, 13 Fidelity L.J. 57, 59 62 (2007).

[5] Reported mortgage fraud continues to increase even after the meltdown of the real estate market. See Mortgage Asset Research Institute, *Twelfth Periodic Mortgage Fraud Case Report* (LexisNexis April 2010).

Countrywide), and have shaken or destroyed institutions who purchased such loans. See John Cassidy, How Markets Fail, 244-47 (2009). Given the number of such loans, the large percentage of such loans in litigation, the historic scale of the ongoing crisis, and the impact of these factors on the national economy, the law applicable to brokerage fraud is of sufficiently exceptional importance to justify certiorari review.

II. Courts Are in Conflict

The holding of the Eleventh Circuit Court of Appeals that broker fraud does not provide grounds for challenge under RESPA is contrary to precedent of the Third Circuit that RESPA's safe harbor provision is limited to legitimate business arrangements, and does not extend to fraudulent schemes:

> We summarily dispose of Countrywide's argument that the statutory safe harbor of section 8(c), 12 U.S.C. § 2607(c), saves it from a finding of a right of action without an overcharge. Essentially, section 8(c) provides specific examples of the types of payments and fees for services that are actually performed and not prohibited by section 8(a) and section 8(b), i.e. legitimate business is exempted from the strictures of section 8. The entire premise of plaintiffs' complaint is that the captive reinsurance arrangement is not a legitimate business arrangement – that Balboa's provision of reinsurance coverage is nothing but a sham and Countrywide collected payment without providing a

> corresponding service (even if the PMI rates paid by plaintiffs are per se reasonable filed rates). Whether it is or is not a legitimate business arrangement – and, thus, whether it is exempted by section 8(c) – is a fundamental merits question that has no bearing whatsoever on what is before us.

Alston v. Countrywide Financial Corp., 585 F.3d 753, 761 n.9 (3rd Cir. 2009). See also *Maganallez v. Hilltop Lending Corp.*, 505 F.Supp.2d 594, 603-04 (N.D. Cal. 2007) ("[w]hether defendants misrepresented the terms of the loan, whether plaintiffs incurred a higher interest rate, and the qualifications and skills of the broker, are all factual issues that affect the value of the services provided"); *DeLeon v. Beneficial Constr. Co.*, 55 F.Supp.2d 819, 824 (N.D. Ill. 1999) (charge for sham service excessive).

Alston is consistent with the Department of Housing and Urban Development ("HUD") policy statement that unscrupulous use of yield spread premiums may violate RESPA:

> HUD also recognizes . . . that in some cases less scrupulous brokers and lenders take advantage of the complexity of the settlement transaction and use yield spread premiums as a way to enhance the profitability of mortgage transactions without offering the borrower lower up-front fees. In these cases, yield spread premiums serve to increase the borrower's interest rate and the broker's overall compensation, without lowering up-front cash requirements for the borrower. As

> set forth in this Statement of Policy, such uses of yield spread premiums may result in total compensation in excess of what is reasonably related to the total value of the origination services provided by the broker, and fail to comply with the second part of HUD's two-part test. . . .

Real Estate Settlement Procedures Act Statement of Policy 2001-1: Clarification of Statement of Policy 1999-1 Regarding Lender Payments to Mortgage Brokers, and Guidance Concerning Unearned Fees Under Section 8(b), 66 Fed. Reg. 53,052 (Oct. 18, 2001).

The courts have developed a two-part test in considering challenges to fees under RESPA. Under this test, it must first be determined whether the broker has provided services of the kind typically associated with a mortgage transaction. If so, it is necessary to determine whether the total compensation to the broker is reasonably related to the total value of the goods or services provided.[6]

The existence of fraud in the provision of brokerage service bears on both prongs of the test. First, in asking whether a broker has "provided goods or

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[6] See *Heimmermann v. First Union Mortg. Corp.*, 305 F.3d 1257, 1263 (11th Cir. 2002), *cert. denied*, 539 U.S. 970, 123 S.Ct. 2641, 156 L.Ed.2d 675 (2003); Paul Barrow, Michael Berenson, & Dan Rosen, *Federal Regulation of Real Estate & Mortgage Lending* § 2.45 (4th ed. database updated through Dec. 2009).

services of the kind *typically* associated with a mortgage transaction," *Heimmermann*, 305 F.3d at 1263 (emphasis added), it should not be assumed that fraud is typically associated with loans. It is questionable whether the word "service" even applies where the acts in question further a scheme to defraud. Was Mr. Madoff actually providing investment services to the victims of his ponzi scheme? (And if so, were fees he charged reasonable?) Such an interpretation is contrary to the accepted meaning of service.[7]

Second, in asking "whether the total compensation paid to the broker is reasonably related to the total value of the goods or services actually provided," *Heimmermann*, 305 F.3d at 1264, the focus should not be on the separate discrete acts of the broker:

> Total compensation to the broker must be reasonably related to the **total value** of the goods or facilities provided or services performed by the broker. Simply delivering a loan with a higher interest rate is not a compensable service.

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[7] See Webster's Third New International Dictionary 2075 (1961) ("an act done for the benefit or at the command of another"); Black's Law Dictionary 1368 (6th ed. 1990) ("[p]erformance of labor for benefit of another, or at another's command"). In other statutory contexts, courts have generally not found tortious conduct as constituting a service. See, e.g., *Fenn v. American Airlines, Inc.*, 839 F.Supp. 1218 (S.D. Miss. 1993) (for purposes of Airline Deregulation Act, services do not include acts constituting false imprisonment or slander).

HUD 2001-1 Statement of Policy (emphasis added). It is the forest, not the trees, that matters. Looking at the forest, we see in the present case that Apex obtained $7,270 by misrepresenting Mr. Sutton's employment and income, procuring a loan he cannot pay. The "total value" is far less than "[s]imply delivering a loan with a higher interest rate," *id.*; it is delivery of an unpayable loan by fraud.

In any other context, incompetence, self-dealing, or fraud would be recognized as bearing on the value of the service provided by the agent. Indeed, at common law misconduct by the agent forfeits the right to any compensation. See Restatement (Second) of Agency § 169 (1958); 2 Fla.Jur.2d Agency & Employment § 92 (2005). RESPA should not be interpreted to be so contrary to common law absent a clear indication of Congressional intent requiring such an interpretation. See, e.g., *Astoria Federal Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108, 111 S.Ct. 2166, 2169-70, 115 L.Ed.2d 96 (1991) ("where a common-law principle is well-established . . . the courts may take it as a given that Congress has legislated with an expectation that the principle will apply except 'when a statutory purpose to the contrary is evident'") (quoting *Isbrandtsen v. Johnson*, 343 U.S. 779, 783, 72 S.Ct. 1011, 1014, 96 L.Ed. 1294 (1952)). Evidence of actual fraud by Mr. Medley should therefore allow, if not compel, the conclusion that fees paid to the dishonest broker are excessive for purposes of RESPA.

CONCLUSION

Mr. Sutton asks that the Supreme Court grant this petition for writ of certiorari in order to consider whether fraud in the provision of brokerage services creates a triable issue of fact under RESPA.

Respectfully submitted,

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[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 09-11149
Non-Argument Calendar

D.C. Docket No. 07-00340-CV-FTM-34DNF

PETER F. SUTTON,

Plaintiff-Appellant,

versus

COUNTRYWIDE HOME LOANS, INC.,
a foreign for profit corporation,

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

(December 4, 2009)

Before CARNES, MARCUS and COX, Circuit Judges.

PER CURIAM:

Peter F. Sutton appeals the grant of summary judgment to Countrywide Home Loans, Inc. on Sutton's claims under the Real Estate Settlement Procedures Act ("Real Estate Act"), 12 U.S.C. § 2607. We affirm.

Sutton owned a home subject to two mortgages, but his only source of income was a $1,080 monthly social security benefit. He desired to reduce his mortgage payments, which exceeded $1,400 per month. So, he sought help from a mortgage broker with Apex Mortgage Services to obtain a refinance loan. During a telephone conversation with Sutton, the broker took down information for a loan application, and then he shopped the loan application to several lenders. According to Sutton, the broker led him to believe that he could receive, from Countrywide, a refinance loan with payments of $428 per month. The broker, however, ultimately arranged for Sutton an adjustable rate loan with Countrywide requiring monthly payments starting at over $1,000 per month and subject to further increases. Sutton signed forms stating he agreed to the terms of the loan arranged by the Apex broker. He claims, however, that he did not understand the terms of the loan until after closing. As compensation for brokering Sutton's loan, Countrywide paid Apex $7,270. This payment included a "yield spread premium" of $4,710, which is a payment made in exchange for the broker delivering a mortgage above the "par rate" being offered by the lender.

Sutton alleges that in applying for this loan on Sutton's behalf, the broker committed a variety of acts that were "wrongful, fraudulent, and predatory." (Appellant's Br. at 13.) For example, the broker reported on the loan application that Sutton earned a monthly salary of $4,500 even though Sutton

informed the broker that his actual income was about one-fourth that amount. Also, Sutton's existing mortgage had a prepayment penalty, and the broker did not notify Sutton of this fact.

Sutton filed suit against Countrywide in Hendry County, Florida Circuit Court alleging a violation of the Real Estate Act. He also brought state law claims for deceptive trade practices, fraud, and elder abuse. Countrywide removed the case to the United States District Court for the Middle District of Florida, invoking federal question and diversity jurisdiction. Sutton then amended his complaint to add Apex as a defendant. But, Apex is apparently no longer in business, and it did not make an appearance to defend the lawsuit. A default was entered against Apex, and Sutton ultimately dismissed with prejudice all claims against it.[1]

Countrywide moved for summary judgment, which the court granted as to the Real Estate Act claim. The court summarized Sutton's theory of the

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[1] When Sutton filed his notice of appeal, no judgment had been entered against Apex, but only an entry of default. We ordered supplemental briefing to address whether there was a final judgment as to all parties to this action. We do not construe the district court's order of January 29, 2009 to remand any federal claims against Apex to the Florida Circuit Court. Sutton has now filed a voluntary notice of dismissal with prejudice of his claims against Apex. The dismissal of Apex cured any jurisdictional defect that would have prevented our review of the merits of this appeal. *See Kramer v. Unitas*, 831 F.2d 994, 997 (11th Cir. 1987).

case as arguing that "because Apex allegedly did bad things in assisting Sutton with his refinancing, Countrywide should not have paid Apex any yield spread premium." (R.4-95 at 4.) It held that because Sutton presented no evidence Countrywide colluded with Apex, or knew or should have known that Apex did "bad things" in brokering the loan, there were no genuine issues of material fact. The court granted Countrywide summary judgment for the Real Estate Act claim and declined to maintain supplemental jurisdiction over the remaining state claims. Sutton appeals the entry of summary judgment for the Real Estate Act claim.

The Real Estate Act proscribes the payment of kickbacks and unearned fees in association with mortgage lending. A payment by a lender to a mortgage broker violates the anti-kickback provisions of the Act when it is made solely in exchange for a referral of business. A payment does not violate the Act if it bears a reasonable relationship to goods or services actually provided or performed by the broker. 12 U.S.C. § 2607(c).

This case involves a yield spread premium. The lowest interest rate at which a lender will make loans without charging a borrower additional up-front fees is commonly referred to as the par rate. If a broker arranges a loan with an interest rate below the par rate, the lender generally requires the broker to pay discount points; these costs are passed along to the borrower. In contrast, if a broker arranges a loan with an interest rate above the par rate, the lender pays

the broker a yield spread premium. This payment is often passed along, in part, to the borrower in the form of reduced loan closing costs. *See e.g. Culpepper v. Inland Mortg. Corp.*, 132 F.3d 692, 694 (11th Cir. 1998) (describing yield spread premiums). In this case, Countrywide paid Apex a yield spread premium of $4,710, and Sutton paid no cash at closing. (R 2-49, Ex. 4.)

We apply a two-step test to consider whether a yield spread premium violates the anti-kickback provisions of the Real Estate Act.

> First, we ask whether the broker performed "actual services" in the course of arranging the mortgage transaction. . . . If the answer to the first question is no, then a [Real Estate Act] violation has been established. If the answer to the first question is yes, we then proceed to ask whether the total compensation was reasonable in light of the total array of services that the broker performed.

Culpepper v. Irwin Mortg. Corp., 491 F.3d 1260, 1273 (11th Cir. 2007) (citations omitted) (applying test set forth in Department of Housing and Urban Development statement of policy). Sutton argues that Apex's acts should not count as "actual services" for purposes of this analysis because they were undertaken as part of a scheme to defraud Sutton by misrepresenting his financial capacity to Countrywide and arranging for him an "unsuitable loan." (Appellant's Reply Br. at 9.) Because Apex provided no "actual services," Sutton

argues, any yield spread premium payment to Apex violated the Real Estate Act under step one of the test. Sutton also contends that even if Apex is found to have offered "actual services," the compensation was unreasonable under step two of the test because the "total array of services" that Apex performed was of no value to Sutton in that he was left with a loan he could not afford. We reject these arguments.

The Real Estate Act's anti-kickback provisions forbid lenders from compensating brokers for referrals. These provisions are not the appropriate vehicle for considering globally – as Sutton would have us do – whether a broker provided fair, honest, and competent service to a borrower. Instead, we consider whether the broker performed *actual* brokerage services; whether it completed tasks or provided goods related to the arrangement of a mortgage that warrant payment from the lender or borrower. If so, we ask if any payment bears "a reasonable relationship to the value received *by the person or company making the payment*." Real Estate Settlement Procedures Act Statement of Policy 1999-1 Regarding Lender Payments to Mortgage Brokers, 64 Fed. Reg. 10080, 10086 (March 1, 1999) (emphasis added). In arranging Sutton's loan, it is undisputed Apex actually completed tasks commonly performed in the origination of a loan. *See id.* at 10085 (listing common loan origination services). Because Apex performed tasks to further the processing and origination of the loan, Countrywide received value from Apex's services. So, its payment to Apex was not a kickback or

unearned fee under step one of our analysis. As to step two, Sutton presents no evidence that Countrywide's payment to Apex was an unreasonably high sum for the types of services Apex performed. Therefore, the yield spread premium in this case satisfies both prongs of the test.

Whether or not Apex acted out of its own self interest to arrange a loan with unfavorable terms for Sutton, this does not negate the fact that Apex performed "actual services" in brokering the loan.[2] Nor does it cause an otherwise reasonable fee for these services to violate the anti-kickback provisions of the Real Estate Act. Because Apex provided "actual services" in arranging Sutton's loan and because the total compensation paid to Apex was not unreasonable, Countrywide's payment did not violate the Real Estate Act.

[2] The district court's opinion includes an implicit finding that the yield spread premium in this case was not unreasonably high. The court also held Sutton presented no evidence that Countrywide colluded with or knew of Apex's alleged misconduct in arranging Sutton's loan. (R.4-95 at 4). We conclude that Sutton has not presented sufficient evidence to show that Countrywide knew or should have known of any acts taken by Apex that could give rise to a colorable claim of fraud. Therefore, we do not consider whether Countrywide would have violated the anti-kickback provisions of the Real Estate Act had it colluded with Apex to arrange an unfavorable loan for Sutton.

CONCLUSION

For the foregoing reasons, we affirm the judgment.

AFFIRMED.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

Peter F. Sutton,

Plaintiff,

v.

Countrywide Home Loans, Inc., and Apex Mortgage Services LLC,

Defendants.

Case No. 2:07-cv-340

MEMORANDUM AND ORDER

This matter is before the Court on Defendant Countrywide Home Loan, Inc.'s Motion for Summary Judgment. For the reasons that follow, the Motion is granted in part and denied in part, and this matter is remanded to state court.

BACKGROUND

Plaintiff Peter Sutton is an 81-year-old homeowner. In June 2006, he refinanced his home, taking out an adjustable-rate mortgage in the amount of $157,000. He worked with a mortgage broker, Apex Mortgage Services ("Apex"), which in turn secured the loan through Defendant Countrywide Home Loans, Inc. ("Countrywide"). Apex is a named Defendant, but it is apparently out of business and a default judgment has been entered against Apex in this lawsuit.

Sutton contends that the mortgage loan he was presented with at the closing contained terms significantly different than the terms he agreed to. He filed suit in Hendry County Circuit Court, raising several claims arising out of the alleged bait-and-switch: a violation of the Real Estate Settlement Procedures Act, 12 U.S.C. § 2607 ("RESPA"); a violation of Florida's Deceptive and Unfair Trade Practices Act, Fla. Stat. § 501.201 *et seq.* ("FDUTPA"); a violation of Florida law which prohibits "fraud, misrepresentation, deceit, negligence, or incompetence in any mortgage financing transaction," Fla. Stat. § 494.0041(2)(b); and a violation of Florida's elder abuse law, Fla. Stat. § 825.102(b). Countrywide removed the lawsuit to this Court, invoking both federal question and diversity jurisdiction. 28 U.S.C. §§ 1331, 1332.

There is no dispute that Countrywide paid Apex a yield spread premium of $4,710, or approximately 3% of the value of the loan. Sutton alleges that the yield spread premium violates RESPA because it is excessive in light of the broker services Apex provided. In essence, his claims are that, in light of Apex's alleged bad acts[1] with respect to Sutton –

[1] Sutton does not explain how Countrywide can be held responsible for Apex's bad acts. His only claim against Countrywide specifically is that he paid for lender-paid mortgage insurance but Countrywide was self-insured and thus allegedly should not have charged him anything for that mortgage insurance. This claim is specious – Countrywide was entitled to

(Continued on following page)

including allegedly falsifying Sutton's income on the loan application, securing a mortgage at a rate higher than it should have been given his credit score, and committing him to a mortgage that was more than he could pay – any yield spread premium paid to Apex was improper.

DISCUSSION

A. Standard of Review

Summary judgment is proper only if there are no disputed issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). The Court must view the evidence and the inferences that may be reasonably drawn from the evidence in the light most favorable to the nonmoving party. *Burton v. City of Belle Glade*, 178 F.3d 1175, 1187 (11th Cir. 1999). Nevertheless, "summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy, and inexpensive determination of every action.'" *Celotex*, 477 U.S. at 327 (quoting Fed. R. Civ. P. 1.).

The moving party bears the burden of showing that there is no genuine issue of material fact and

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self-insure, and Sutton does not claim that Countrywide provided no insurance.

that it is entitled to judgment as a matter of law. *O'Ferrell v. United States*, 253 F.3d 1257, 1265 (11th Cir. 2001). The nonmoving party must demonstrate the existence of specific facts in the record that create a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). A party opposing a properly supported motion for summary judgment may not rest upon mere allegations or denials and must do more than simply show that there is some metaphysical doubt as to the material facts. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

B. RESPA

Sutton admits that yield spread premiums are not per se illegal. The 11th Circuit has specifically held that yield spread premiums are legal, provided such premiums are reasonable compensation for brokerage services. *Heimmermann v. First Union Mortgage Corp.*, 305 F.3d 1257, 1263-64 (11th Cir. 2002). The relevant inquiry is whether the total compensation is reasonable in light of the array of services the broker provided. *Culpepper v. Irwin Mortgage Corp.*, 491 F.3d 1260, 1273 (11th Cir. 2007).

As noted above, Sutton argues that because Apex allegedly did bad things in assisting Sutton with his refinancing, Countrywide should not have paid Apex any yield spread premium. However, Sutton has come forward with no evidence that Countrywide knew or should have known what Apex was doing. Absent

evidence that Countrywide knew what Apex was doing or colluded with Apex in some way, Sutton has failed to show that genuine issues of fact remain for resolution on his RESPA claim, and that claim must be dismissed.

B. Florida Law

Because the Court has dismissed the only federal claim in the Complaint, and because the parties concede that the amount in controversy does not exceed the $75,000 necessary for the exercise of this Court's diversity jurisdiction, the Court declines to exercise supplemental jurisdiction over Sutton's state-law claims. *See* 28 U.S.C. § 1367(c) (authorizing the Court to decline to exercise supplemental jurisdiction over a state law claim when it "has dismissed all claims over which it has original jurisdiction."); *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 726 (1966) ("[I]f the federal claims are dismissed before trial . . . the state claims should be dismissed as well."). This matter was originally filed in state court, and therefore the Court will remand the remaining claims back to that court.

CONCLUSION

Sutton has failed to raise any genuine issue of fact on his federal claim and that claim must be dismissed. Having dismissed the federal claim, the Court declines to exercise jurisdiction over the remaining claims.

Accordingly, **IT IS HEREBY ORDERED** that:

1. Defendant's Motion for Summary Judgment (Docket No. 49) is **GRANTED in part** and **DENIED in part**;

2. Count I is **DISMISSED with prejudice** and the Court declines to maintain supplemental jurisdiction over the remaining state claims; and

3. The Clerk is **DIRECTED** to remand the case to the Circuit Court of the Twentieth District, in and for Hendry County, Florida and to transmit a certified copy of this Order to the Clerk of that Court. The Clerk is further **DIRECTED** to terminate all pending motions and deadlines and close this case.

Dated: Thursday, January 29, 2009

s/ Paul A. Magnuson
Paul A. Magnuson
United States District
Court Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 09-11149-AA

PETER F. SUTTON,

Plaintiff-Appellant,

versus

COUNTRYWIDE HOME LOANS, INC., a foreign for profit corporation,

Defendant-Appellee.

On Appeal from the United States District Court
for the Middle District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

(Filed Mar. 5, 2010)

Before: CARNES, MARCUS and COX, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ E.R. Cox
UNITED STATES CIRCUIT JUDGE

12 U.S.C. § 2607. Prohibition against kickbacks and unearned fees

(a) Business referrals

No person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person.

(b) Splitting charges

No person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed.

(c) Fees, salaries, compensation, or other payments

Nothing in this section shall be construed as prohibiting

(1) the payment of a fee

(A) to attorneys at law for services actually rendered or

(B) by a title company to its duly appointed agent for services actually performed in the issuance of a policy of title insurance or

(C) by a lender to its duly appointed agent for services actually performed in the making of a loan,

(2) the payment to any person of a bona fide salary or compensation or other payment for goods or facilities actually furnished or for services actually performed,

(3) payments pursuant to cooperative brokerage and referral arrangements or agreements between real estate agents and brokers,

(4) affiliated business arrangements so long as

(A) a disclosure is made of the existence of such an arrangement to the person being referred and, in connection with such referral, such person is provided a written estimate of the charge or range of charges generally made by the provider to which the person is referred

(i) in the case of a face-to-face referral or a referral made in writing or by electronic media, at or before the time of the referral (and compliance with this requirement in such case may be evidenced by a notation in a written, electronic, or similar system of records maintained in the regular course of business);

(ii) in the case of a referral made by telephone, within 3 business days after

the referral by telephone,[1] (and in such case an abbreviated verbal disclosure of the existence of the arrangement and the fact that a written disclosure will be provided within 3 business days shall be made to the person being referred during the telephone referral); or

(iii) in the case of a referral by a lender (including a referral by a lender to an affiliated lender), at the time the estimates required under section 2604(c) of this title are provided (notwithstanding clause (i) or (ii)); and any required written receipt of such disclosure (without regard to the manner of the disclosure under clause (i), (ii), or (iii)) may be obtained at the closing or settlement (except that a person making a face-to-face referral who provides the written disclosure at or before the time of the referral shall attempt to obtain any required written receipt of such disclosure at such time and if the person being referred chooses not to acknowledge the receipt of the disclosure at that time, that fact shall be noted in the written, electronic, or similar system of records maintained in the regular course of business by the person making the referral),

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[1] So in original.

(B) such person is not required to use any particular provider of settlement services, and

(C) the only thing of value that is received from the arrangement, other than the payments permitted under this subsection, is a return on the ownership interest or franchise relationship, or

(5) such other payments or classes of payments or other transfers as are specified in regulations prescribed by the Secretary, after consultation with the Attorney General, the Secretary of Veterans Affairs, the Federal Home Loan Bank Board, the Federal Deposit Insurance Corporation, the Board of Governors of the Federal Reserve System, and the Secretary of Agriculture. For purposes of the preceding sentence, the following shall not be considered a violation of clause (4)(B):

(i) any arrangement that requires a buyer, borrower, or seller to pay for the services of an attorney, credit reporting agency, or real estate appraiser chosen by the lender to represent the lender's interest in a real estate transaction, or

(ii) any arrangement where an attorney or law firm represents a client in a real estate transaction and issues or arranges for the issuance of a policy of title insurance in the transaction directly as agent or through a separate corporate title insurance agency that may be established by that attorney or

law firm and operated as an adjunct to his or its law practice.

(d) Penalties for violations; joint and several liability; treble damages; actions for injunction by Secretary and by State officials; costs and attorney fees; construction of State laws

(1) Any person or persons who violate the provisions of this section shall be fined not more than $10,000 or imprisoned for not more than one year, or both.

(2) Any person or persons who violate the prohibitions or limitations of this section shall be jointly and severally liable to the person or persons charged for the settlement service involved in the violation in an amount equal to three times the amount of any charge paid for such settlement service.

(3) No person or persons shall be liable for a violation of the provisions of subsection (c)(4)(A) of this section if such person or persons proves by a preponderance of the evidence that such violation was not intentional and resulted from a bona fide error notwithstanding maintenance of procedures that are reasonably adapted to avoid such error.

(4) The Secretary, the Attorney General of any State, or the insurance commissioner of any State may bring an action to enjoin violations of this section.

(5) In any private action brought pursuant to this subsection, the court may award to the prevailing party the court costs of the action together with reasonable attorneys fees.

(6) No provision of State law or regulation that imposes more stringent limitations on affiliated business arrangements shall be construed as being inconsistent with this section.

Supreme Court, U.S.
FILED
JUL 6 - 2010
OFFICE OF THE CLERK

No. 09-1480

In The
Supreme Court of the United States

PETER F. SUTTON,

Petitioner,

versus

COUNTRYWIDE HOME LOANS, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does evidence of fraud by a mortgage broker in misrepresenting the terms of a loan to the borrower, and misrepresenting the borrower's income to the lender, create a triable issue as to whether a yield spread premium paid by the lender to the broker violates the prohibition in 12 U.S.C. § 2607 against kickbacks and unearned fees when there is no evidence the lender was aware of the fraud or colluded with the broker?

LIST OF PARTIES AND RULE 29.6 STATEMENT

The parties to the proceedings for which review is sought are those appearing in the caption of this case. In addition, Apex Mortgage Services, LLC was a named party defendant in the district court. Bank of America Corporation, a publicly traded company, is the parent corporation of its wholly-owned subsidiary Countrywide Financial Corporation. Countrywide Financial Corporation is the parent corporation of respondent, Countrywide Home Loans, Inc.

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Respondent, Countrywide Home Loans, Inc. ("**Countrywide**"), respectfully requests that this Court deny the petition for writ of certiorari.

STATEMENT OF THE CASE

Petitioner Peter F. Sutton ("**Sutton**") refinanced his house with a loan he could not afford even though he was aware of the loan terms when signing the closing documents. Then, instead of rescinding the loan within the 3-day rescission period, he sued his mortgage broker, Apex Mortgage Services, LLC ("**Apex**"), and lender, Countrywide, claiming violations of Florida's Deceptive and Unfair Trade Practices Act, FLA. STAT. § 501.201 *et seq.* ("**FDUTPA**"); Florida law prohibiting "fraud, misrepresentation, deceit, negligence, or incompetence in any mortgage financing transaction," FLA. STAT. § 494.0041(2)(b); Florida's elder abuse law, FLA. STAT. § 825.102(b); and Section 8 of the Real Estate Settlement Procedures Act, 12 U.S.C. § 2607 ("**RESPA** § 8") (*see* Pet. App. 17-22).

At the hearing on Countrywide's motion for summary judgment, Sutton produced evidence related to misrepresentations by *Apex* – which went out of business and defaulted. Sutton claimed Countrywide should have known he could not afford the loan, and, because Apex allegedly performed broker services

inappropriately, the "yield spread premium"[1] Countrywide paid to Apex for those services was an illegal kickback or unearned fee under RESPA § 8. Countrywide produced evidence and argued the yield spread premium was not illegal because it was reasonable in light of the numerous services Apex provided. Countrywide also repeatedly argued that Countrywide could not be held liable for Apex's independent activities.

In an unpublished decision, the district court found:

> Sutton alleges that the yield spread premium violates RESPA because it is excessive in light of the broker services Apex provided. In essence, his claims are that, *in light of Apex's alleged bad acts with respect to Sutton . . . any yield spread premium paid to Apex was improper.*

Pet. App. 10 (emphasis added). The district court granted Countrywide's summary judgment motion, stating:

> The relevant inquiry is whether the total compensation is reasonable in light of the array of services the broker provided . . . Sutton has come forward with no evidence that Countrywide knew or should have

[1] The Eleventh Circuit describes yield spread premiums in its opinion. Pet. App. 4-5.

> known what Apex was doing. Absent evidence that Countrywide knew what Apex was doing or colluded with Apex in some way, Sutton has failed to show that genuine issues of fact remain for resolution on his RESPA claim, and that claim must be dismissed.

Pet. App. 12-13. The district court declined to exercise supplemental jurisdiction over Sutton's state law claims and remanded them to state court. Pet. App. 13.

Sutton appealed the entry of summary judgment but could not establish Countrywide acted inappropriately or that the yield spread premium was illegal under the two-part test – designated by the Department of Housing and Urban Development ("**HUD**") in RESPA Statement of Policy 1999-1[2] and RESPA Statement of Policy 2001-1[3] – used by federal courts to determine the legality of yield spread premiums.

The Eleventh Circuit affirmed the summary judgment in an unpublished opinion. Quoting

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[2] RESPA Statement of Policy 1999-1 Regarding Lender Payments to Mortgage Brokers, 64 Fed. Reg. 10080 (March 1, 1999) ("**Policy Statement 1999-1**").

[3] RESPA Statement of Policy 2001-1: Clarification of Statement of Policy 1999-1 Regarding Lender Payments to Mortgage Brokers, and Guidance Concerning Unearned Fees Under Section 8(b), 66 Fed. Reg. 53052 (Oct. 18, 2001) ("**Policy Statement 2001-1**").

Culpepper v. Irwin Mortgage Corporation, 491 F.3d 1260, 1273 (11th Cir. 2007) – the leading case addressing yield spread premiums – the court described the HUD two-part test:

> First, we ask whether the broker performed "actual services" in the course of arranging the mortgage transaction. . . . If the answer to the first question is no, then a [RESPA] violation has been established. If the answer to the first question is yes, we then proceed to ask whether the total compensation was reasonable in light of the total array of services the broker performed.

Pet. App. 5. The court then determined the yield spread premium satisfied the test "[b]ecause Apex performed tasks to further the processing and origination of the loan, [and] Countrywide received value from Apex's services." *Id.* at 6. The court rejected Sutton's argument, stating RESPA's "anti-kickback provisions . . . are not the appropriate vehicle for considering globally . . . whether a broker provided fair, honest, and competent service to a borrower." Pet. App. 6. The court noted Sutton did not present sufficient evidence demonstrating Countrywide knew or should have known of Apex's acts. *Id.* at 7 n. 6. As such, it "refused to consider whether Countrywide would have violated the anti-kickback provision of [RESPA] had it colluded with Apex." *Id.* For this reason, the question presented *infra*

page i is narrower than the question presented in Sutton's petition (*see* Pet. at i).

REASONS WHY THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED

1. The Question Presented Does Not Justify Certiorari Review.

Sutton states the obvious – predatory lending and mortgage broker fraud are important issues. Pet. 7-9. The real question – whether RESPA § 8 provides a remedy for broker fraud when there is no evidence the lender was aware of the fraud or colluded with the broker (*infra*, p. i) – is not sufficiently important to justify certiorari review. As the Eleventh Circuit recognized in refusing to publish the decision at issue, this question does not present an important issue of federal law with significant practical consequences. RESPA § 8 addresses and proscribes the payment of kickbacks and unearned fees in association with mortgage loan transactions; RESPA § 8 is not directed to broker fraud. Numerous other state and federal laws address and protect borrowers from broker fraud and provide remedies. Because other viable protections and remedies for broker fraud exist, the practical consequences of the Eleventh Circuit's decision as to borrowers are not significant. Indeed, the opposite is true because, had the Eleventh Circuit ruled in Sutton's favor, the consequences for lenders would be significant.

Neither the HUD Policy Statements nor case law indicate that RESPA § 8 was enacted for the purpose of combating broker fraud or misrepresentations of the type alleged by Sutton against Apex. If Sutton's argument is accepted, lenders that have no way of knowing a broker is acting improperly or that a borrower is unhappy with the terms of a loan – such as Countrywide in this case – could be found liable under RESPA § 8 each time they pay a yield spread premium. This would result in an evisceration of yield spread premium payments to brokers, a practice HUD finds beneficial to borrowers. *See* Policy Statement 2001-1, 66 Fed. Reg. at 53054. Sutton's subjective standard also would be much more difficult to apply than the HUD two-part test.

Numerous state and federal laws protect borrowers from broker fraud and provide remedies. In fact, Sutton continues to litigate claims against Countrywide in state court for violations of FDUTPA, FLA. STAT. § 494.0041(2)(b), and Florida's elder abuse law. Other claims, such as civil conspiracy or common law fraud, are also available in state or federal court. Under federal law, borrowers are protected by the Truth in Lending Act, 15 U.S.C. § 1601 *et seq.*, requiring clear disclosure of key terms and costs of lending arrangements. Other examples are broadly interpreted federal mail and wire fraud statutes and the Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, enhancing criminal enforcement of federal laws regarding mortgage fraud.

These and other laws protect borrowers from broker fraud. Because other remedies exist, the question of whether RESPA § 8 *also* provides a remedy for broker fraud when the lender has no knowledge of the fraud is not sufficiently important to justify certiorari review.

2. The Circuits Do Not Conflict And The Eleventh Circuit Correctly Interpreted RESPA.

No conflict exists among the circuits. A footnote in a case that does not even address yield spread premiums or broker fraud does not establish a conflict. In fact, only one court of appeal – the Eleventh Circuit in the unpublished and non-binding decision issued in this case (Pet. App. 1-8) – has addressed whether broker fraud should be considered in determining whether a lender has violated RESPA § 8. It rightly holds RESPA's "anti-kickback provisions . . . are not the appropriate vehicle for considering globally . . . whether a broker provided fair, honest, and competent service to a borrower." Pet. App. 6.

Alston v. Countrywide Financial Corporation, 585 F.3d 753, 755 (3d Cir. 2009), offered as the conflicting case (Pet. 9-10), addresses an entirely different issue whether RESPA § 8 creates a private right of action when there is no overcharge allegation. In *Alston*, homebuyers alleged that premiums paid to a lender-affiliated reinsurance company were kickbacks to the

lender by the primary insurer in return for the lender's referral of business. *Id.* at 757. The homebuyers *did not* allege broker fraud, and the Third Circuit *did not* apply the HUD two-part test. *See generally, id.*

Sutton relies on footnote 9 of *Alston* to "conjure up" a conflict. Pet. 9-10. Therein, the Third Circuit refused the lender's request to consider, on a motion to dismiss, whether services were "actually performed" by the reinsurance company. *Id.* at 761 n. 9. The court noted, as an example, that "legitimate business services" are "actually performed," but it did *not* address whether, under the HUD test, broker fraud should be considered in determining whether "actual services" were performed. *See id.* This footnote does not conflict with the Eleventh Circuit's decision in the instant case.

The *district court* cases cited by Sutton (Pet. 10) likewise do not create a conflict among the circuits and are distinguishable. In *DeLeon v. Beneficial Construction Company*, 55 F. Supp. 2d 819, 824 (N.D. Ill. 1999), the borrower survived a motion to dismiss under RESPA when he alleged that *no* services were performed by the broker. This holding has no bearing here because even Sutton admits Apex performed services. In *Maganallez v. Hilltop Lending Corporation*, 505 F. Supp. 2d 594, 604 (N.D. Cal. 2007), the court stated it could consider broker misrepresentations in determining the value of broker services but nevertheless recognized that *the borrowers still had to show another broker would have not been paid a*

similar amount for the services. The court held that, at the motion to dismiss stage of the proceedings, it was premature to dismiss a claim before the parties could present evidence in this regard. *Id.* Here, Sutton *did* have an opportunity to present evidence but failed to do so.[4]

Sutton's assertion that the HUD Policy Statements are consistent with *Alston* (Pet. 10) is incorrect. Sutton quotes Policy Statement 2001-1 for the proposition that yield spread premiums *may* violate RESPA § 8 (Pet. 10-11) but ignores important phrases in the quote:

> HUD also recognizes, however, that in some cases less scrupulous brokers and lenders take advantage of the complexity of the settlement transaction and use yield spread

[4] The petition omits discussion of cases where borrowers' allegations of fraud were very similar to Sutton's, but the courts found no violation of RESPA § 8. *See Stutzka v. McCarville*, 420 F3d 757, 758-9 (8th Cir. 2005) (broker exaggerated income of blind and mentally handicapped borrower, processed loan at a fixed rate but closed it at a variable rate, and the monthly payment after refinancing was greater than the monthly payment before refinancing); *see also Chow v. Aegis Mortg. Corp.*, 286 F. Supp. 2d 956, 963 (N.D. Ill. 2003) (lender provided inconsistent and potentially misleading TILA disclosures, uniform settlement statement, and good faith estimates); *see also Prince Servance v. BankUnited, FSB*, No. 07-C-1259, 2009 WL 2448103 *5 (N.D. Ill., Aug. 9, 2009) (unpublished opinion) (summary judgment for lender over allegations of fraud and deception).

> premiums as a way to enhance the profitability of mortgage transactions *without offering the borrower lower up-front fees*. In these cases, yield spread premiums serve to increase the borrower's interest rate and the broker's overall compensation, *without lowering up-front cash requirements for the borrower*.

66 Fed. Reg. at 53054 (emphasis added). Abuses occur when yield spread premiums do *not* lower the borrower's up-front cash requirements. In the case at issue, the yield spread premium lowered Sutton's up-front cash requirement – Sutton paid no cash at closing and, in fact, received a disbursement. Indeed, Policy Statement 2001-1 promotes the use of yield spread premiums:

> [A] yield spread premium can be a useful means to pay some or all of a borrower's settlement costs. In these cases, lender payments reduce the up front cash requirements to borrowers. In some cases, borrowers are able to obtain loans without paying any up front cash for the services required in connection with the origination of the loan. Instead, the fees for these services are financed through a higher interest rate on the loan. The yield spread premium thus can be a legitimate tool to assist the borrower. The availability of this option fosters home ownership.

66 Fed. Reg. at 53054.

Sutton ignores that, in applying the HUD test to the yield spread premium Countrywide paid to Apex, the Eleventh Circuit closely adhered to case law precedents and the Policy Statements (Pet. App. 5-6), none of which indicate broker fraud should be considered when determining whether the broker performed "actual services" or if the total compensation paid for those services was reasonable.

The 1999-1 Policy Statement contains a non-exclusive list of what HUD considers to be "actual services", including services like completing the loan application, collecting financial information, and ordering appraisals. 64 Fed. Reg. at 10085. Instead of arguing services were not rendered, Sutton argues the first prong of the HUD test was not met because the services were part of a fraudulent scheme. Pet. 12. Sutton's displeasure with his loan has no bearing on whether actual services were performed. The Eleventh Circuit correctly held that the yield spread premium was legal under the first-prong of the HUD test. Pet. App. 6-7.

The Eleventh Circuit also properly found that the total compensation for Apex's services was reasonable. Pet. App. 7. The 2001-1 Policy Statement sets forth three ways to determine the value of the services furnished by a mortgage broker. First, "careful consideration" must be given to "fees paid in relation to price structures and practices in similar transactions and in similar markets." 66 Fed. Reg. at 53055 (quoting 1999-1 Policy Statement, 64 Fed. Reg. at 10084). Second, the "level of difficulty involved in

qualifying applicants for particular loan programs" should be considered. *Id.* Finally, HUD considers "loans of similar size and similar characteristics within similar geographic markets." *Id.* Sutton failed to submit any competent evidence of valuation in accordance with these three methods. The Eleventh Circuit properly rejected Sutton's argument that his subjective valuation of the services should be considered in determining whether the total compensation was reasonable. Pet. App. 6.

The Eleventh Circuit's decision was correct and closely adheres to prior case law and the HUD Policy Statements. The decision at issue does not conflict with decisions of other circuits.

CONCLUSION

For these reasons, Countrywide asks this Court to deny the petition for writ of certiorari.

Respectfully submitted,

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